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PRESENT DAY LABOR LITIGATION*

The recent cases of *Reardon v. Caton* (1919) 189 App. Div. 501, 178 N. Y. Supp. 713 and *Buyer v. Guillan* (1920, U. S. D. C., S. D. N. Y.) 63 N. Y. L. J. 1625, with the interesting questions of law and economics involved therein, serve as excellent samples of the progress of the law as it meets each new problem and either aids or temporarily retards its solution. Certainly the two cases invite attention to the present status of labor litigation and an inquiry as to whether the courts are finding the true remedy for our economic disturbances. The questions involved in the two cases are practically identical and have their origin in the same state of facts. The defendant unions, composed of freight handlers, checkers, weighers, etc., on the steamship piers in New York City, refused to handle any freight not brought there by union truck drivers. A trucking company and individual

*[This comment is the first of a series on this vitally important subject. The first installment is a classification of the cases.—Ed.]

shippers applied for an injunction to prevent this discrimination, but in each instance the injunction was denied and the acts of the union upheld.[1]

As a result of these two decisions, the shipping facilities of the greatest port in the United States were virtually placed under the control of trade unions. Not only must the dock workers be union men, but also the persons engaged in transporting the goods to the docks. This rule might logically be extended to the manufacture of goods as well. The forces opposed to such unionization, after the cases were decided against them, received considerable newspaper publicity about their steps to organize independent and non-union transportation and shipping facilities. It was a typical industrial conflict. Even a brief survey of the extensive labor litigation of this character existing at the present time, indicates that the courts are occupying a more prominent part in our economic and political life than at any time since the slavery cases preceding the Civil War. And while much criticism is naturally levelled at their decisions, yet they have to meet squarely these problems of economic growth. It is to them that we must look for the establishment of sound principles that will direct us to economic peace and justice; particularly since the legislatures are shouldering but a small part of the burden.

The decisions of the various courts seem at times to be in hopeless conflict as they struggle with this question. But there are certain definite principles gradually being evolved, about which the decisions group themselves. In order to analyse existing cases and to reach a basis for the discussion of any labor litigation, it is elementary that one

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[1] These decisions are in accord with the leading New York cases on this subject. *Nat'l Protective Ass. v. Cumming* (1902) 170 N. Y. 315, 63 N. E. 369; *Paine Lumber Co. v. Neal* (1917) 244 U. S. 459, 37 Sup. Ct. 718 (recognizing *Nat'l Protective Ass. v. Cumming* as the established New York rule); *Bossert v. Dhuy* (1917) 221 N. Y. 342, 117 N. E. 582 (which approves statement in *Paine Lumber Co. v. Neal*). It is necessary to distinguish these cases from those in which force or coercion is directed against third parties. See *Auburn Draying Co. v. Wardell* (1919) 227 N. Y. 1, 124 N. E. 97, where the court says, "It was not simply that the members refused to be employed by the plaintiff or its patrons, unless and until it employed members of the union. The unions . . . induced employers of labor . . . and the people generally . . . to abstain from business transactions with the plaintiff . . . by causing loss . . . or fear of loss . . . to their business. . . . They sought to compel and did compel those employers and the people to coerce the plaintiff to unionize its business." And in *Michaels v. Hillman* (1920, Sup. Ct.) 112 Misc. 395, 183 N. Y. Supp. 195, it is said that "If no threats, intimidation, force, violence, or other coercive measures were employed, the defendants are not liable, for they were within their rights in seeking to compel recognition by calling a strike."

Contra to the principal case of *Reardon v. Caton*, and criticised in *Buyer v. Guillan, supra*, is the recent case of *Burgess Bros. Co. v. Stewart* (1920, Sup. Ct.) 112 Misc. 347, 184 N. Y. Supp. 199, although the court there tried to distinguish its view.

must first determine what rights are involved and then what constitutes a violation of those rights. The decisions are not always clear as to just what primary rights are involved in the question under discussion, but it is believed that by a proper analysis those which protect the employer can be grouped under two heads: (1) rights against interference with existing contractual relations; and (2) the right to a free market of both labor and goods.[2] The employee, on the other hand, originally had almost no privileges except that he, as an individual, might stop work when he so desired. Concerted action was a violation of the then existing rules of law.[3] Public opinion, however, gradually brought about a change, so that trade unionism was recognized as a lawful feature of our economic structure. The result was that as employees became legally privileged to organize and to act collectively by agreement, the previously existing legal rights of the em-

[2] The two are closely allied. In (2) the courts insist that the employer shall be privileged to deal with others and to do so unhampered and without compulsion of any kind, while in (1) they hold that the performance of this contract, once made, is to be free from the same interference. These doctrines are merely an expression of the prima facie tort idea. In general any person whose interference with the employer's dealings with another person, in any way other than by mere persuasion, causes harm, has committed a prima facie tort against both parties. And the same thing is true of interference with the performance of a contract, the only reason for drawing a distinction between the two being the fact that the courts are more willing to justify an interference under (2) than under (1). This may be due to the fact that the right that third persons should not interfere with existing contractual relations was recognized in our law at a much earlier period than the right that they should not prevent the consummation of inchoate contracts. The division thus seems to be one of degree and precedent rather than of fundamental principles.

That these are recognised as rights, see *O'Brien v. People* (1905) 216 Ill. 354, 75 N. E. 108, where it is stated that "The law is well settled that every person shall be protected in the right to enter into contracts or in refusing to do so . . . without interference by others. No person or combination of persons can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any attempt to compel an individual, firm, or corporation to execute an agreement to conduct his or its business . . . by a particular class of employees is not only unlawful and actionable, but is an interference with the exercise of the highest civil right." This was followed in *Barnes v. Typographical Union* (1908) 232 Ill. 424, 83 N. E. 940 (where the dissenting opinion was inclined to hold it a prima facie tort justified, saying, "Changing conditions in the industrial world constantly require us to make applications of existing laws to situations not before contemplated"). See also 7 Labatt, *Master & Servant* (1913) 8171, 8326; Smith, *Crucial Issues in Labor Litigation* (1907) 20 HARV. L. REV. 261; Cooke, *Combinations, Monopolies, Labor Unions* (2d ed. 1909) 58; W. W. Cook, *Privileges of Labor Unions* (1918) 27 YALE LAW JOURNAL, 779, note 53.

[3] The earliest reported case on this subject is *The Tubwomen v. The Brewers of London*, cited in *King v. Journeymen-Taylors* (1721, K. B.) 8 Mod. 10. For an excellent discussion of the growth of this rule see Parrington, *The Tubwomen v. The Brewers of London* (1903) 3 COL. L. REV. 447. This rule was adopted in only two states, New York and Pennsylvania, and it was soon abandoned.

ployers were correspondingly negatived and reduced. We thus find a growing clash of interests. As soon as society permits the employees to call a strike or to threaten to call one, we have a prima facie tort, for such action must necessarily involve interference with the employer's rights. Conceding that these must be modified to some extent, how far shall we hold the acts of the union privileged? The only standard is public policy, and that must determine the rights and privileges to be accorded to either party. It is in the settlement of this point that the courts experience great difficulty and are in conflict. They even now seem to grope in an effort to determine just what should be embraced in the concept "justifiable trade competition," and to realize to some extent their opportunity and obligation of evolving sound social laws to guide us in our industrial growth.

In deciding that a given strike is wrongful, the courts have assigned various reasons, which may be roughly grouped. The wrong lies: either in the fact of combination itself;[4] or in the unjustifiable object of the combination; or in the means employed. This division forms the basis for discussion in these comments. The first group is no longer important; the second involves many conflicting decisions which we may now seek to classify; the third is comparatively easy of solution, and will be discussed in a later comment.

Where the court holds that the object of the combination is unlawful, it is meant of course that the object sought to be accomplished by the strike is not justifiable as trade competition[5] and so does not make lawful the prima facie tort. This matter of justification is somewhat

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[4] This rule is only of historical interest and serves to explain many of the early decisions. That the combination is illegal *per se* has not been recognized in any of the later cases, although the view has its supporters among those who believe that there should be a tort of conspiracy as well as such a crime. Mr. Justice Holmes in his dissenting opinion in *Vegelahn v. Guntner* (1896) 167 Mass. 92, 44 N. E. 1077, says, "But there is a notion which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But in the general form in which it has been presented and accepted by many courts, I think it plainly untrue, both on authority and principle." See also *Karges Furniture Co. v. Amalgamated Woodworkers' Local* (1905) 165 Ind. 421, 75 N. E. 877; 1 B. R. C. 246, note; (1920) 29 YALE LAW JOURNAL, 809.

[5] "Trade Competition" is here used in its broadest sense. It is submitted that this expression should be used to designate the struggle between employees themselves, such as a conflict between two unions, or a union and non-union employees, since these are really in trade competition each with the other. It seems to be misleading as applied to the situation wherein the employee is not striving to displace someone, as in a strike for better working conditions, for example. This distinction is recognized by Mr. Justice Holmes in *Vegelahn v. Guntner, supra* note 4, where he suggests that a general term to cover this situation might be, free struggle for life."

confused, not only because the courts differ on the proper test of justification, but also because at times they declare a strike illegal because of the methods of prosecuting it, when actually they mean that the act is not justifiable as trade competition. This is particularly true in cases involving secondary strikes and boycotts. Consequently we must sometimes look to the final result of the decision rather than to the reasons given to support it.

In developing the question as to what constitutes a justification it seems best to take up and discuss separately each natural division of labor disputes, disregarding temporarily any situations in which contract rights are involved.

A. The primary situation is that in which the employees go on strike against their employer Y to obtain shorter hours, higher wages, or better working conditions in general.[6] It is to be noticed that there are here but two parties involved, and the general rule seems to be that the employees may strike for any reason whatsoever, or indeed for no reason at all.[7]

B. The next situation is that in which the employees strike against Y to compel him to discharge Z, a fellow employee. There is here a triangular dispute with three sets of rights and duties involved.[8] The employees usually have one of two purposes: (1) They may seek to secure a competent fellow employee. This is generally considered to be a justifiable purpose.[9] (2) They may attempt to compel Z to join

[6] No distinction will be drawn between a strike and a threat to strike, for in the writer's opinion the legal effect is the same. See Parker, C. J., in *Nat'l Protective Ass. v. Cumming, supra* note 1. This question becomes of importance chiefly in secondary strikes and boycotts, and it is submitted that if there is any difference whatsoever, it is coercion of a stronger kind actually to stop work for A until he ceases to deal with B, than it is merely to threaten to do so. The word "strike" in this discussion is taken to mean the concerted refusal to work until certain conditions are performed, and not simply a cessation of work with no intention of resuming.

[7] There is very little authority for holding such a strike unlawful. It may at one time have been a prima facie tort against Y to strike in order to compel him to conduct his business as the employees directed; yet the rule seems to have been honored in the breach rather than in the observance, and so the act is not even considered a prima facie tort requiring justification; it is no tort at all. Usually, of course, a primary strike of this kind involves some dispute as to employment, and so the decisions, "playing safe," call it a justifiable strike. See *Wabash Ry. v. Hannahan* (1903, C. C. E. D. Mo.) 121 Fed. 563.

[8] This is still a dispute as to terms of employment between Y and his employees, and the great weight of authority holds that there is a justification of the prima facie tort against Y. The relation between the employees and Z is discussed below.

[9] "Many decisions, and perhaps the weight of authority, uphold the right of employees, either individually or in combination, to quit working because some fellow servant is obnoxious to them. . . . This is on the principle that employees may choose both their employer and their working associates." *Carter v. Oster* (1908) 134 Mo. App. 146, 112 S. W. 995; accord, *Clemmitt v.*

a union. This then becomes the question of the closed shop. Some courts hold that the injury to Z is justifiable, while others are squarely opposed to this view.[10] But where such a closed shop policy involves a monopoly of the entire trade, making it necessary that Z take up a new trade or seek employment elsewhere, the courts are more hesitant and appear to be pretty evenly divided as to whether this is lawful or not.[11]

Watson (1895) 14 Ind. App. 38, 42 N. E. 367; *Nat'l Protective Ass. v. Cumming, supra* note 1; *Berry v. Donovan* (1905) 188 Mass. 353, 74 N. E. 603. There is, of course, a violation of Z's prima facie right not to be prevented from dealing with Y; but any legitimate reason of the employees will justify this prima facie tort. Where the employees act on mere personal dislike, not founded on good cause, the tort is not justified. *De Minico v. Craig* (1911) 207 Mass. 593, 94 N. E. 317; *Bausbach v. Reiff* (1914) 244 Pa. 559, 91 Atl. 224.

[10] Here again the prima facie tort against Y is generally considered to be justified, for the unions are still engaged in a primary dispute as to terms of employment. And indeed as against Z, also, the great weight of authority is to the effect that the strike is legally justifiable. *Pickett v. Walsh* (1906) 192 Mass. 572, 78 N. E. 753 (where unions even refused to take Z into membership, because they limited the number of their members); *Mills v. United States Printing Co.* (1904) 99 App. Div. 605, 91 N. Y. Supp. 185, affirmed in (1910) 199 N. Y. 76, 92 N. E. 214. *Contra, Erdman v. Mitchell* (1903) 207 Pa. 79, 56 Atl. 327 (held to be contrary to spirit of Bill of Rights).

There are but few courts that hold a strike for a closed shop to be unjustifiable. *O'Brien v. People, supra* note 2; *Barnes & Co. v. Berry* (1907, C. C. S. D. Ohio), 156 Fed. 72 (which states that a closed shop is against public policy); *Barnes v. Typographical Union, supra* note 2. The cases of *O'Brien v. People* and *Barnes v. Typographical Union* are distinguished in *Kemp v. Division No. 241* (1912) 255 Ill. 213, 99 N. E. 389, where it was held that a strike to have a non-union workman discharged was lawful. In *Smith v. Bowen* (1919) 232 Mass. 106, 121 N. E. 814, it was held that a strike for a closed shop was illegal, but not where it was to enforce an agreement to maintain a closed shop. Of like effect is *Shinsky v. O'Neil* (1919) 232 Mass. 99, 121 N. E. 790 (which also approves of collective bargaining); and see (1919) 28 YALE LAW JOURNAL, 611.

[11] The reasons against such a monopoly are stated by Prentice, C. J. in *Connors v. Conolly* (1913) 86 Conn. 641, 86 Atl. 600: the "tendency [of monopoly] is to expose him [Z] to the tyranny of the will of others, and to bring about a monopoly which will exclude what he has to dispose of, and other people need, from the open market, or perhaps from any market. . . . They [monopolies] are especially intolerable where they concern the basic resource of individual existence, to wit, the capacity to labor." Probably the leading case for those who hold such a monopoly unjustifiable is the one often cited, *Berry v. Donovan, supra* note 9. This decision, too, is based on the idea that "A monopoly, controlling anything which the world must have, is fatal to prosperity and progress. . . . The attempt to force all laborers to combine in unions is against the policy of the law, because it aims at monopoly." It is to be noticed that the principle of the closed shop is not disapproved by the Connecticut courts, except when it causes a virtual monopoly. *Cohn & Roth Electric Co. v. Bricklayers' Local* (1917) 92 Conn. 161, 101 Atl. 659. For the contrary view see *Nat'l Protective Ass. v. Cumming, supra* note 1.

Where the dispute is between two unions, that is, union A strikes if union B is given any work, the courts seem to regard it as in no wise different from a strike against non-union men. Competition of this kind between combinations

A situation closely allied to these cases arises when X, a union organizer, tries to unionize Y's shop. Usually X is enjoined because of the means used (picketing, threats, etc.), but the majority of courts also hold that his interference is unjustifiable.[12]

C. The class of cases most before the courts at the present time seems to be that involving four or more parties: that is, when employees strike against Y to compel him to refuse to deal with W, an employer of non-union labor. These cases are perhaps the most interesting, and have the most divergent results of any in the field of labor litigation. They generally arise in either of two ways. (1) The employees of Y refuse to work with employees (non-union) of W, both engaged on different work but engaged on the same general task. The weight of later authority seems to support the employees of Y.[13] This also applies to that situation in which W is a sub-contractor and puts in his work either before or after Y.[14] (2) The employees of Y refuse to handle goods manufactured by W (non-union employer).

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of men, carried on for purpose of gain, is not actionable unless there is malice. *Nat'l Protective Ass. v. Cumming, supra* note 1; *Pickett v. Walsh, supra* note 10; *Erdman v. Mitchell, supra* note 10.

[12] *Jonas Glass Co. v. Glass Bottle Blowers' Ass.* (1907) 72 N. J. Eq. 653, 66 Atl. 953, affirmed in (1911) 77 N. J. Eq. 219, 79 Atl. 262; *Hitchman Coal & Coke Co. v. Mitchell* (1917) 245 U. S. 229, 38 Sup. Ct. 65; *Eagle Glass Mfg. Co. v. Rowe* (1917) 245 U. S. 275, 38 Sup. Ct. 80; *Roraback v. Motion Picture Machine Operators' Union* (1918) 140 Minn. 481, 168 N. W. 766 (to prevent plaintiff from operating machine himself); *Stuyvesant Lunch & Bakery Corp. v. Reimer* (1920, Sup. Ct.) 110 Misc. Rep. 357, 181 N. Y. Supp. 212. *Contra, Steffes v. Motion Picture Machine Operators' Union* (1917) 136 Minn. 200, 161 N. W. 524; *Empire Theatre Co. v. Cloke* (1917) 53 Mont. 183, 163 Pac. 107; *Diamond Block Coal Co. v. United Mine Workers* (1920, Ky.) 222 S. W. 1079; *Michaels v. Hillman, supra* note 1. It is suggested that this is, after all, but an extension of the closed shop idea discussed in the preceding note, except that here the organization is from the outside instead of originating with the employees. If carried to its logical conclusion the result would be one united labor world.

A peculiar situation, akin to this last, arises where the unions attempt to compel an employer to unionize his shop and also seek to dictate the number of men to be employed. This case has arisen in regard to theatre orchestras and has been decided both ways. *Haverhill Strand Theatre v. Gillen* (1918) 229 Mass. 413, 118 N. E. 671 (unions enjoined); *Scott-Stafford Opera House Co. v. Minneapolis Musicians' Ass.* (1912) 118 Minn. 410, 136 N. W. 1092 (unions upheld); see (1918) 27 YALE LAW JOURNAL, 1088.

[13] It is to be noted that the unions here leave the realm of direct benefits (wages, hours, etc.), and their only justification can be the strengthening of the union ranks as a whole. The following decisions have upheld the unions in such a case. *Cohn & Roth Electric Co. v. Brick-layers Local, supra* note 11; *Gray v. Building Trades Council* (1903) 91 Minn. 171, 97 N. W. 663 (provided union does not threaten others). See also cases, *supra* note 10. *Contra, Snow Iron Works v. Chadwick* (1917) 227 Mass. 382, 116 N. E. 801.

[14] *Nat'l Fireproofing Co. v. Mason Builders' Ass.* (1909, C. C. A. 2d) 169 Fed. 259; *Gray v. Building Trades Council, supra* note 13; *Meier v. Speer* (1910) 96 Ark. 618, 132 S. W. 988.

The authorties are very much in conflict on this point, the present tendency possibly being to uphold the employees of Y[15] as is evidenced in the two principal cases. This situation is ordinarily called a boycott, but is to be distinguished from the so-called secondary boycott.[16]

PROVISIONS FOR FORFEITURE OUTSIDE THE INSURANCE POLICY

The extreme lengths to which the courts will go in order to hold an insurance company bound is well exemplified in the recent case of *Southland Life Insurance Co. v. Hopkins* (1920, Tex. Civ. App.) 219 S. W. 254. This was a suit upon an insurance policy which gave 31 days without interest as a period of grace for the payment of premiums. A statute required a month's period of grace, with interest. The insured gave an eight months note, without grace, with interest, for a premium, the note providing that if it were not paid at maturity the "policy shall be void, subject to the provisions therein contained." Nine days before the note was due, the company wrote the insured, warning him that the policy would lapse if the note were not paid, but offering to accept a partial payment and to extend the balance. The insured died one day after the note was due, not having paid it. The

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[15] *Parkinson Co. v. Building Trades Council* (1908) 154 Calif. 581, 98 Pac. 1027; *Duplex Printing Co. v. Deering* (1918, C. C. A. 2d) 252 Fed. 722 (based on Clayton Act); *Meier v. Speer, supra* note 14; *Jetton-Dekle Lumber Co. v. Mather* (1907) 53 Fla. 969, 43 So. 590 (first Florida case involving a labor dispute); *Reardon v. Caton, supra; State v. Employers of Labor* (1918) 102 Neb. 768, 169 N. W. 717; *Sheehan v. Levy* (1919, Tex.) 215 S. W. 229; *State v. Van Pelt* (1904) 136 N. C. 633, 49 S. E. 177 (held not to be a criminal conspiracy); *Bossert v. Dhuy, supra* note 1; discussed in COMMENTS (1918) 27 YALE LAW JOURNAL, 539.

It will be found that in most of the cases opposed to this view there is the presence of a fifth party, such as a labor leader, who is in a position to dictate to the employees of Y. *Booth & Bro. v. Burgess* (1906) 72 N. J. Eq. 181, 65 Atl. 226; *Jonas Glass Co. v. Glass Bottle Blowers Ass., supra* note 12. Ofttimes, too, the threatening of the customers of W causes the courts to take unfavorable action when it is quite likely that a mere abstention from handling non-union material would not be enjoined. See dissenting opinion of Cornish, J., in *State v. Employers of Labor, supra* note 15; *Burnham v. Dowd* (1914) 217 Mass. 351, 104 N. E. 841.

[16] This distinction is clearly brought out by Justice A. N. Hand in the principal case of *Buyer v. Guillan, supra.* "In that case [*Auburn Draying Co. v. Wardell, supra* note 1] the labor unions used their influence to have the patronage withdrawn from the non-union shop. Dealers, ice deliverers, bakers, butchers, builders, plumbers, and contractors, because of the notices, warnings, and declarations of the defendant, discontinued business with the plaintiff. In other words, there was a secondary boycott in the Auburn Draying Company case which embraced far more than in the case at bar or in the case of *Bossert v. Dhuy* [*supra* note 1]. Here the acts of the defendants were limited to boycotting goods that came to the pier where they were working and were the subject-matter upon which their labor was to be expended."

court allowed a recovery by the plaintiff, J. Boyce dissenting in a strong opinion.

There has been some difference of opinion in the courts as to the effect of a provision for forfeiture in a note given for the premium, where there was no such stipulation in the policy itself. It has been held that such a condition in the note is without effect, in the absence of a stipulation in the policy.[1] Other courts reach the result that such a provision merely creates a condition subsequent, of which the company must avail itself by clear and unequivocal acts, such as demanding payment at maturity and declaring a forfeiture if payment is not made.[2] The orthodox view, however, is that such a provision in the note should have the same effect as if it were contained in the policy also.[3] It would seem that this is the just result, and that the insured should not be allowed the advantage of an extension of time without the corresponding burden of forfeiture. In the instant case, therefore, the company should not be held to have waived the forfeiture by its silence on the day the note was due.[4] The letter written to the insured cannot be made the basis of an estoppel, as it clearly warned the insured of the threatened lapse of the policy, and the insured, being delirious with the influenza, could in no way have relied upon it.

It has long been discussed in the law of insurance whether, in the absence of an estoppel, there can be a waiver of a forfeiture without new consideration. This would seem to depend on the question whether a policy on which a forfeiture has been incurred is void or voidable. In spite of the frequent use of such terms as "void" and "of no effect," the intention of the parties would appear to be that such a clause merely makes the policy voidable, that is, gives the company power to avoid it, but has no further operation. This is the usual interpretation of such a provision to the lay mind. Mr. Ewart, in his article on *Waiver in Insurance*,[5] assumes that such a policy is voidable only, in working out his principle of "election." The modern tendency is certainly toward such an interpretation.[6] If such a con-

[1] *Dwelling-House Ins. Co. v. Hardie* (1887) 37 Kan. 674, 16 Pac. 92.

[2] *Rissler v. Fidelity Mutual Ins. Co.* (1903) 110 Tenn. 411, 75 S. W. 735.

[3] *Frank v. Sun Life Assurance Co.* (1892) 20 Ont. App. 564. See Vance, *Insurance* (1904) 237: "It can make no possible difference in legal contemplation whether the condition avoiding the policy for non-payment of the note is written on the face of the policy, or on the face of the note, or on a premium receipt, or in any other properly executed instrument. It is equally a part of the contract, and should be enforced as made. If the insured has signed, and the insurer has received, a premium note in which it is stipulated that if it shall not be paid at maturity, the policy is to be null and void, a failure to pay operates of itself to avoid the contract, and the mere fact that the insurer may waive the forfeiture if he sees fit, does not affect the case."

[4] *Benholzer v. New York Life Ins. Co.* (1898) 74 Minn. 387, 77 N. W. 295; *Underwood v. Security Life and Annuity Co.* (1917) 108 Tex. 381, 194 S. W. 585.

[5] (1905) 18 HARV. L. REV. 364.

[6] *Kingman v. Lancashire Ins. Co.* (1899) 54 S. C. 599, 32 S. E. 762; *Lantz v. Vermont Life Ins. Co.* (1891) 139 Pa. 546, 21 Atl. 80.

tract is held to be voidable at the option of the company, there is, in legal theory, no necessity for consideration in exercising the power to avoid the policy. It remains legally operative in the absence of an affirmative act of avoidance. It has been definitely held that consideration is not necessary even where no circumstances of estoppel exist.[7] A surety may waive a defense given him by the fact that his creditor has given time to the principal debtor.[8] A party may waive the defense of the statute of limitations without consideration.[9] These are cases of technical defenses which the law regards with disfavor, as it does forfeitures in insurance.

In the instant case the court held that the insured was entitled to one month of grace after the maturity of the note. This holding was based on the fact that the statute specifically required a month of grace. But the statute required a month of grace *with interest,* and the insured here really had eight months of grace with interest. The note plainly specified that it was without grace. Where there is no such statute, the courts are uniform in not adding the period of grace to the time allowed by the note.[10] And under a similar statute the Michigan court refused to add the statutory period to the time allowed.[11]

It would seem that the court erred in holding that no forfeiture had ever occurred and that, if it had, the company was either estopped to show it or had waived the forfeiture.

PRIVILEGED COMMUNICATIONS TO PHYSICIANS

In the famous trial of the Duchess of Kingston for bigamy,[1] Lord Mansfield remarked that "if a surgeon was voluntarily to reveal . . . secrets, to be sure he would be guilty of a breach of honor, and of great indiscretion, but to give that information in a court of justice, which by the law he is bound to do, will never be imputed to him as any indiscretion whatever." Although the latter part of this dictum has become settled law,[2] strangely enough the first part, if the great Chief Justice meant to imply legal liability as attached to such a breach of confi-

[7] *German Ins. Co. v. Pitcher* (1902) 160 Ind. 392, 64 N. E. 921.

[8] *Hooper v. Pike* (1897) 70 Minn. 84, 72 N. W. 829.

[9] Wood, *Limitations* (4th ed. 1916) sec. 68.

[10] *Lefler v. New York Life Ins. Co.* (1906, C. C. A. 8th) 143 Fed. 814; *Bank of Commerce v. New York Life Ins. Co.* (1906) 125 Ga. 552, 54 S. E. 643.

[11] *Schmedding v. Northern Assurance Co.* (1912) 170 Mich. 528, 136 N. W. 361.

[1] *Trial of the Duchess of Kingston* (1776, H. L.) 20 How. St. Tr. 355, 573.

[2] At common law, information obtained while treating patients is not privileged in the sense that a physician can not be compelled to testify to such communication or knowledge upon the witness stand. Wharton, *Criminal Evidence* (10th ed. 1912) sec. 516; 1 Greenleaf, *Evidence* (16th ed. 1899) sec. 247a; see (1900) 64 JUSTICE OF THE PEACE, 241. But this rule has been changed by statute in a majority of American Jurisdictions. 40 Cyc. 2381; 17 Am. St. Rep. 570, note; Greenleaf, *op. cit.;* Evans, *Privileged Communications to Physicians* (1894) 39 CENT. L. J. 114, has a collection of statutory provisions with full discussion.

dence, had never been tested in an American court[3] until the recent case of *Simonsen v. Swenson* (1920, Neb.) 177 N. W. 831, which the court declares "is a novel one. No cases bearing directly upon the question have been cited by counsel, and our search has been unsuccessful." The defendant physician had examined a boarding-house guest and informed him that he was suffering from a highly contagious venereal disease. The defendant requested the plaintiff to leave, telling him of the danger of communicating the disease to others, and the latter promised to do so. The physician, upon learning from the proprietor that he was still there, informed the owner of the plaintiff's condition, and the latter was forced to leave, although in fact he was not afflicted as the defendant had diagnosed.

The imputation of a contagious venereal disease is actionable per se as slander;[4] but the case was not tried upon that theory, for both parties apparently agreed that the defendant had adequate grounds for his belief, acted without malice, and made only such disclosures as he thought reasonable and proper under the circumstances. The plaintiff sued for a breach of "the duty of secrecy," citing a statute[5] revoking the license of any physician guilty of unprofessional conduct, an instance of which is defined as "the betrayal of a professional secret to the detriment of a patient."

Although the court with doubtful accuracy construed this statute as creating a tort duty not to disclose such secrets, yet it held the communication to the owner privileged in the circumstances. The same result, however, could more readily have been reached by common-law principles, and Lord Mansfield might have been more directly vindicated. The relationship of physician and patient is one arising out of a consentual contract;[6] such a relationship manifestly implies an obligation of secrecy, and the disclosure of such confidences entails more than a literal "breach of honour." To attempt to deny such a principle or to set up its antithesis is perhaps the best means to make its necessity apparent. "That a medical man, consulted in a matter of delicacy, of which the disclosure may be most injurious to the feelings, and possibly, the pecuniary interests of the party consulting, can gratuitously and unnecessarily make it the subject of public communication, without incurring any imputation beyond what is called a breach of honour, and without the liability to a claim of redress in a court of law, is a proposition to which, when thus broadly laid down, I think the court will hardly give their countenance."[7]

As illustrated in the present case, there is a limit to this existing

[3] See L. R. A. 1917 C, 1131, note.

[4] Newell, *Slander & Libel* (3d ed. 1914) sec. 215, with authorities collected.

[5] 1913 Neb. Rev. St., sec. 2721.

[6] *Bowers v. Santee* (1919) 99 Ohio, 361, 124 N. E. 238; see 22 A. & E. Encyc. 790, 798.

[7] Lord Fullerton in *A. B. v. C. D.* (1851, Scotch Court of Sessions) 14 Ct. of Sess. Cas. (2nd series) 177, 7 Scots Rev. Rep. 800, the only decision directly

duty: to preserve silence is a duty owed to the individual, but only as a member of society; and when absolute silence becomes detrimental to the public welfare, the duty ceases. When the confidential relationship of physician and patient discloses to the former a disease that will necessarily be transmitted to others unless the danger of contagion is made known to certain persons, public policy requires that there should no longer be any duty of complete secrecy. The duty of non-disclosure is then replaced by a legal privilege of giving information so far as this may be necessary to prevent the spread of the disease.[8] In respect to certain duly constituted authorities, there may be even a legal duty of making the disclosure.[9]

INCORPORATION OF NATIONALIST CLUBS

The Catalonian Nationalist Club of New York applied to a justice of the Supreme Court of New York for the approval of a certificate as a membership corporation. The object of the corporation was to make a center of representation of Catalonian culture and of the legitimate national aspirations of Catalonia in America, to diffuse information, to promote fellowship, and to unite with similar societies in this and other nations. The justice refused to approve the certificate saying that it had "been demonstrated in the recent past that the great need of the time is the teaching of American culture" and that the declared purposes of the corporation "if carried out to their ultimate completion, might result detrimentally to the interests of the United States." *Application of Catalonia Nationalist Club of New York* (1920, Sup. Ct.) 184 N. Y. Supp. 132.

The New York corporations law permits incorporation of a membership corporation "for any lawful purpose" and requires the approval of a justice of the supreme court before the certificate is filed with the secretary of state.[1] It has generally been held that in passing upon such a certificate the officer or court acts in a ministerial and not in a discretionary or judicial capacity.[2] In some jurisdictions a discretion-

in point, but apparently overlooked by counsel and the court in the instant case. See *Smith v. Driscoll* (1917) 94 Wash. 441, 442, 162 Pac. 572 (cited in the present decision): "Neither is it necessary to pursue at length the inquiry of whether a cause of action lies in favour of a patient against a physician for wrongfully divulging confidential communications. For the purposes of what we shall say it will be assumed that for so palpable a wrong the law provides a remedy." But see NOTES (1920) 20 COL. L. REV. 890, where the contract element is not discussed.

[8] See (1915) 79 JUSTICE OF THE PEACE, 3.

[9] Such as is created by statutes requiring the reporting of contagious diseases to boards of health. See Hemenway, *Public Health* (1914) secs. 32, 392 ff., 410; 20 Halsbury, *Laws of England*, 338.

[1] 3 Cons. Laws of N. Y. 1909, 3408.

[2] *State ex rel. College of Bishops v. Vanderbilt University* (1913) 129 Tenn. 279, 328, 164 S. W. 1151, 1164; 1 Clark & Marshall, *Private Corporations* (1903)

ary power has been expressly conferred by statute.[3] It is always found difficult to determine the line of distinction between ministerial and discretionary or judicial acts. When the court or officer has to determine whether or not there is an apparent attempt to evade a duty imposed by law,[4] whether the purpose of the corporation is business or social,[5] or whether the name is a proper one under the statute,[6] he must exercise a discretionary or judicial power. Such decisions are in many cases subject to judicial review.

Where the purpose of a non-commercial corporation is manifestly unlawful the certificate may be denied.[7] Incorporation may also be refused on grounds of public policy, a reason invoked when the corporation purposed to hold its meetings on Sunday;[8] when a by-law forbade members to enlist in the Army or Navy of the United States;[9] and when the purposes of the corporation tended to increase divorce.[10] The fact that the corporation was not a "necessary" one and that the name was not in the English language have been held insufficient reasons for denying the certificate on such grounds.[11] The cases are numerous where certificates have been denied or charters suspended because the corporations tended toward monopoly or restraint of trade and consequently were against public policy.[12]

An analysis of the reasons stated seems to lead to some question as to whether the discretionary power in this case was properly exercised. The issue has been raised many times in the past and it yet remains to be determined whether the fostering of affection or interest in the native homes and early associations of our naturalized citizens is detrimental to America, and whether the prohibition is not an attempt to suppress one of the most natural instincts of civilized man.

Reference was recently made in these columns to the case of *Town of Windsor v. Whitney et al.* (1920, Conn.) 111 Atl. 354.[1] We stated that the court upheld the constitutionality of Rev. Stat. 1918, secs. 391-395, which provide for the establishment of building lines by a commis-

[3] *Beach v. McKay* (1917) 108 Tex. 224, 191 S. W. 557.

[4] *People ex rel. Barney v. Whalen* (1907 Sup. Ct.) 56 Misc. Rep. 278, 106 N. Y. Supp. 434.

[5] *People ex rel. Davenport v. Rice* (1893, Sup. Ct.) 68 Hun, 24, 22 N. Y. Supp. 631; *People ex rel. Bonnie v. Rose* (1900) 188 Ill. 268, 59 N. E. 432.

[6] *People ex rel. Felter v. Rose* (1907) 225 Ill. 496, 80 N. E. 293.

[7] *Hanger v. Commonwealth* (1908) 107 Va. 872, 60 S. E. 67.

[8] *In re Agudath Hakehiloth* (1896, Sup. Ct.) 18 Misc. Rep. 717, 42 N. Y. Supp. 985.

[9] *In re Charter Mulholland Benevolent Society* (1873, Pa. D. C.) 10 Phila. 19.

[10] *In re Helping Hand Marriage Association* (1881, Pa. D. C.) 15 Phila. 644.

[11] *In re Deutsch-Amerikanischer Volksfest-Verein* (1901) 200 Pa. 143, 49 Atl. 949.

[12] I Fletcher, *Cyc. Corporations* (1917) 179 and cases collected in the notes.

[1] See COMMENTS (1920) 30 YALE LAW JOURNAL, 171, 174.

sion on town plan. Our attention has been called to the fact that the validity of this statute was not directly in issue in this case, but rather the constitutionality of a special act of the general assembly creating a commission on town plan for the town plan of Windsor.[2] This act differs from the one first mentioned in that it provides for no compensation. Chief Justice Wheeler, writing the majority opinion, sustains the validity of the special act as a regulation of the use of land under the police power. This case even goes further than necessary to uphold the general statute.[3]

Justice Gager, in a strong dissenting opinion, argues that "this is a taking of property without compensation. Calling what in fact is an exercise of the right of eminent domain an exercise of the police power, does not avoid the constitutional question."[4] He seems as anxious to hold that a building restriction is an exercise of the power of eminent domain as the majority is to find it a valid exercise of the police power. The real issue is best stated by Justice Gager in the following words:

"Whether there is benefit or damage is, as to a given lot, a question of fact to be determined by a proper tribunal, in which the property owner is given a chance to be heard; it is not a question of law to be determined according as to whether you call the act, which is at all times one and the same, an exercise of the police power or of the right of eminent domain."

In the final analysis the question is not one of terms used, but the broad question of public policy, whether property should be held subject to regulations that may be placed upon it for the benefit of society or whether there must be a payment of compensation whenever property rights seem to be invaded. The courts are upholding regulations placed upon land when no compensation is provided, sustaining them when necessary as a valid exercise of the police power. Many of our "inherent" rights still "inhere," but not in their former robust proportions and Connecticut in the instant case has gone further than many of her sister states.

The decision of the New York Court of Appeals in *People, ex rel. Mulkins, v. Jimerson* (Oct. 5, 1920) 64 N. Y. L. J. 545, presents a

[2] Special Laws 1917, at p. 827.

[3] The court is careful to place the decision squarely upon grounds of public health, safety, or morals. Upon the "aesthetic purpose" issue, the instant case is not inconsistent with the case of *Farist Steel Co. v. Bridgeport* (1891) 60 Conn. 278, 22 Atl. 561. That case held that the establishment of a harbor line constituted a taking of property which could not be permitted, even with conpensation, unless for a public use, and that a purely aesthetic purpose was not a public use. Under the authority of the instant case, however, it would seem that the establishment of this harbor line might now be sustained under the police power.

[4] See *St. Louis v. Hill* (1893) 116 Mo. 527, 22 S. W. 861; *Matter of Clinton Ave.* (1901) 57 App. Div. 166, 68 N. Y. Supp. 196.

modern illustration of mediæval conditions when law was personal and tribal, instead of "common," and each man's legal relations were determined by the law of his particular tribe, even though he lived in the midst of other peoples subject to different law. Living within the limits of the state of New York are five Indian tribes, known as the Onondaga, Seneca, Tuscarora, Saint Regis, and Shinnecock tribes. Statutes for their government, passed from the year 1797 down to the present time, now appear as chapter 26 of the Consolidated Laws of New York. By these statutes a special tribal court, known as the Peacemakers' Court, is established with jurisdiction over all controversies between Indians, "whether arising upon contracts or for wrongs and particularly for any encroachments or trespass on any land," and with "exclusive jurisdiction to grant divorces between Indians" and to determine questions of title to land. An appeal lies to the Council of the tribe. Action having been brought in the Peacemakers' Court of the Seneca nation against the relator to recover possession of land, she applied to the Supreme Court of New York for a writ of prohibition without making any appearance in the Peacemakers' Court. It is by this writ that inferior courts are restrained from exceeding their jurisdiction, and it was by using the writ freely that Lord Chief Justice Coke was able to kill the court of small claims, called the Court of Requests, to limit the jurisdiction of the admiralty and the ecclesiastical courts, and thus to concentrate judicial power in the King's courts. The Court of Appeals does not decide whether the Supreme Court is a superior court to the Peacemakers' Court with authority to prohibit action by the latter,[1] but refuses the writ on the ground that it must be assumed that the Peacemakers' Court will keep within its jurisdiction. "A writ of prohibition will not be granted in anticipation of erroneous rulings by a court of limited jurisdiction on jurisdictional questions." It would appear that under the statutory constitution of these Indian nations in New York, the Peacemakers' Court may, as to all matters specified, recognize all tribal rules and customs and by judicial decisions enact them into law. The common law of New York is not the common law of the Seneca Indian nation.

The old question as to the jurisdiction of a court to try a case involving title to real property in another state has arisen again in the case of *Arizona Commercial Mining Co. v. Iron Cap Copper Co.* (1920, Me.) 110 Atl. 429. The defendant and the plaintiff were both Maine cor-

[1] The Appellate Division has held that the Supreme Court is not such a superior court and has no authority to issue writs of prohibition to the Peacemakers' Court. *People, ex rel. Jimerson, v. Shongo* (1913) 83 Misc. 325, affd. (1914) 164 App. Div. 908. The Indians "are not governed by our laws, and their courts are not inferior courts to our courts, but are courts of a foreign jurisdiction."

porations. Through its own shafts in Arizona the defendant removed certain ores which were the property of, and in the possession of the plaintiff. The court properly took jurisdiction and allowed the plaintiff to recover. Where the gist of the action is a tortious injury to land in one state, the courts of another will not take jurisdiction, on the ground that such an issue is exclusively local in character.[1] If the question of title is only collaterally in issue, as in the adjudication of contractual rights incidentally involving title to land, or one involving severance of chattels from the realty and conversion, a foreign court will take jurisdiction.[2]

The case of *The Porto Alexandre* [1920, C. A.] P. 30, decided that a public ship of a foreign state is exempt from process of English courts, although it is being used in an ordinary commercial transaction. The same rule has been established in the United States courts.[1] The foundation on which this doctrine rests is that a public vessel is a manifestation of the sovereignty of an independent foreign state, and must be respected as the person of the sovereign would be.[2] Ships under the control of the United States Shipping Board are by statute specifically made subject to the laws governing ordinary merchant vessels.[3]

The recent case of *Stanton v. Southwick* (1920, K. B.) 123 L. T. 651, raises an interesting point in Verminal Jurisprudence. The rats in the case were mere trespassers, and not licensees, and the court held them to be ferae naturae—very unlike bugs, which are part of the premises. Hence unless a rat were legally domiciled in one's residence, his presence is no breach of warranty to the tenant, who has a privilege to eject him at the rodent's own risk. No recovery was allowed since the rats in the case were total strangers to the defendant. *Caveant muridae.*

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[1] See (1916) 16 COL. L. REV. 323.
[2] See (1911) 11 COL. L. REV. 262; 34 L. R. A. (N. S.) 994, note.
[1] *The Maipo* (1918, S. D. N. Y.) 252 Fed. 627, (1918) 28 YALE LAW JOURNAL, 187.
[2] *The Parlement Belge* (1878, C. A.) L. R. 5 P. 197.
[3] U. S. Comp. St. 1918, sec. 8146e.